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## Interview Summary

Application No.

09/477,564

Applicant(s)

MANERA, DAVID A.

Examiner

Stephen K. Cronin

Art Unit

3727

All participants (applicant, applicant's representative, PTO personnel):

(1) Stephen K. Cronin.

(3) \_\_\_\_\_.

(2) Eugene Renz, Jr..

(4) \_\_\_\_\_.

Date of Interview: 21 February 2002.

Type: a) ☐ Telephonic b) ☐ Video Conference

c) ☒ Personal [copy given to: 1) ☐ applicant 2) ☒ applicant's representative]

Exhibit shown or demonstration conducted: d) ☒ Yes e) ☐ No.

If Yes, brief description: Citations of case law in support of reissue.

Claim(s) discussed: 11-13 and 15-20.

Identification of prior art discussed: Folta.

Agreement with respect to the claims f) ☐ was reached. g) ☒ was not reached. h) ☐ N/A.

Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: Discussed the claims as amended and in general what errors may or may not be corrected in reissue. Applicants representative set forth case law which is believed to support the amendment of the claims as presented. The examiner set forth the offices position and agreed to consider applicants arguments when filed.

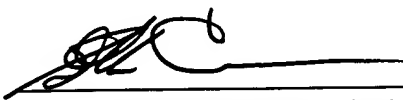
(A fuller description, if necessary, and a copy of the amendments which the examiner agreed would render the claims allowable, if available, must be attached. Also, where no copy of the amendments that would render the claims allowable is available, a summary thereof must be attached.)

i) ☐ It is not necessary for applicant to provide a separate record of the substance of the interview(if box is checked).

Unless the paragraph above has been checked, THE FORMAL WRITTEN REPLY TO THE LAST OFFICE ACTION MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW. (See MPEP Section 713.04). If a reply to the last Office action has already been filed, APPLICANT IS GIVEN ONE MONTH FROM THIS INTERVIEW DATE TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW. See Summary of Record of Interview requirements on reverse side or on attached sheet.

Stephen K. Cronin  
Primary Examiner

Examiner Note: You must sign this form unless it is an Attachment to a signed Office action.

  
Examiner's signature, if required

## Summary of Record of Interview Requirements

### Manual of Patent Examining Procedure (MPEP), Section 713.04, Substance of Interview Must be Made of Record

A complete written statement as to the substance of any face-to-face, video conference, or telephone interview with regard to an application must be made of record in the application whether or not an agreement with the examiner was reached at the interview.

#### Title 37 Code of Federal Regulations (CFR) § 1.133 Interviews

##### Paragraph (b)

In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not remove the necessity for reply to Office action as specified in §§ 1.111, 1.135. (35 U.S.C. 132)

#### 37 CFR §1.2 Business to be transacted in writing.

All business with the Patent or Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

The action of the Patent and Trademark Office cannot be based exclusively on the written record in the Office if that record is itself incomplete through the failure to record the substance of interviews.

It is the responsibility of the applicant or the attorney or agent to make the substance of an interview of record in the application file, unless the examiner indicates he or she will do so. It is the examiner's responsibility to see that such a record is made and to correct material inaccuracies which bear directly on the question of patentability.

Examiners must complete an Interview Summary Form for each interview held where a matter of substance has been discussed during the interview by checking the appropriate boxes and filling in the blanks. Discussions regarding only procedural matters, directed solely to restriction requirements for which interview recordation is otherwise provided for in Section 812.01 of the Manual of Patent Examining Procedure, or pointing out typographical errors or unreadable script in Office actions or the like, are excluded from the interview recordation procedures below. Where the substance of an interview is completely recorded in an Examiners Amendment, no separate Interview Summary Record is required.

The Interview Summary Form shall be given an appropriate Paper No., placed in the right hand portion of the file, and listed on the "Contents" section of the file wrapper. In a personal interview, a duplicate of the Form is given to the applicant (or attorney or agent) at the conclusion of the interview. In the case of a telephone or video-conference interview, the copy is mailed to the applicant's correspondence address either with or prior to the next official communication. If additional correspondence from the examiner is not likely before an allowance or if other circumstances dictate, the Form should be mailed promptly after the interview rather than with the next official communication.

The Form provides for recordation of the following information:

- Application Number (Series Code and Serial Number)
- Name of applicant
- Name of examiner
- Date of interview
- Type of interview (telephonic, video-conference, or personal)
- Name of participant(s) (applicant, attorney or agent, examiner, other PTO personnel, etc.)
- An indication whether or not an exhibit was shown or a demonstration conducted
- An identification of the specific prior art discussed
- An indication whether an agreement was reached and if so, a description of the general nature of the agreement (may be by attachment of a copy of amendments or claims agreed as being allowable). Note: Agreement as to allowability is tentative and does not restrict further action by the examiner to the contrary.
- The signature of the examiner who conducted the interview (if Form is not an attachment to a signed Office action)

It is desirable that the examiner orally remind the applicant of his or her obligation to record the substance of the interview of each case unless both applicant and examiner agree that the examiner will record same. Where the examiner agrees to record the substance of the interview, or when it is adequately recorded on the Form or in an attachment to the Form, the examiner should check the appropriate box at the bottom of the Form which informs the applicant that the submission of a separate record of the substance of the interview as a supplement to the Form is not required.

It should be noted, however, that the Interview Summary Form will not normally be considered a complete and proper recordation of the interview unless it includes, or is supplemented by the applicant or the examiner to include, all of the applicable items required below concerning the substance of the interview.

A complete and proper recordation of the substance of any interview should include at least the following applicable items:

- 1) A brief description of the nature of any exhibit shown or any demonstration conducted,
- 2) an identification of the claims discussed,
- 3) an identification of the specific prior art discussed,
- 4) an identification of the principal proposed amendments of a substantive nature discussed, unless these are already described on the Interview Summary Form completed by the Examiner,
- 5) a brief identification of the general thrust of the principal arguments presented to the examiner,  
(The identification of arguments need not be lengthy or elaborate. A verbatim or highly detailed description of the arguments is not required. The identification of the arguments is sufficient if the general nature or thrust of the principal arguments made to the examiner can be understood in the context of the application file. Of course, the applicant may desire to emphasize and fully describe those arguments which he or she feels were or might be persuasive to the examiner.)
- 6) a general indication of any other pertinent matters discussed, and
- 7) if appropriate, the general results or outcome of the interview unless already described in the Interview Summary Form completed by the examiner.

Examiners are expected to carefully review the applicant's record of the substance of an interview. If the record is not complete and accurate, the examiner will give the applicant an extendable one month time period to correct the record.

#### Examiner to Check for Accuracy

If the claims are allowable for other reasons of record, the examiner should send a letter setting forth the examiner's version of the statement attributed to him or her. If the record is complete and accurate, the examiner should place the indication, "Interview Record OK" on the paper recording the substance of the interview along with the date and the examiner's initials.

## PATENTS

### 1. Reissue — In general (§58.1)

Reissue oath or declaration must state that patent is defective or partly inoperative or invalid because of defects in specification or drawing, or because patentee has claimed more or less than he is entitled to; second, applicant must allege that defective, inoperative, or invalid patent arose through error without deceptive intent.

### 2. Reissue — In general (§58.1)

Error provision of 35 USC 251 is to be liberally construed to permit correction of defects; attorney's failure to appreciate full scope of invention is one of most common sources of defects in patents; fact that error could have been discovered at time of prosecution with more thorough patentability search or with improved communication between inventors and attorney does not, by itself, preclude patent owner from correcting defects through reissue; where attorney's error was discovered after commercialization of invention and issuance of patent, and where application for broader claims was filed within two years after original patent issued, attorney's explanation of his error in misunderstanding scope of invention is sufficient to satisfy error requirement of 35 USC 251.

### 3. Reissue — In general (§58.1)

Attorney's declaration that his error, misunderstanding scope of invention, arose because no prior art search was done and he assumed limitations were required by prior art, without justification, is sufficient explanation of how error arose to satisfy requirements of 37 CFR 175(a)(5).

### 4. Specification — Sufficiency of disclosure (§62.7)

Description requirement of 35 USC 112 is separate from enablement requirement of that provision; it is not necessary that claimed subject matter be described identically, but that disclosure originally filed convey to those skilled in art that applicant had invented subject matter later claimed; precisely how close original description must come to comply with description requirement of Section

112 must be determined on case by case basis; inquiry into whether description requirement is met is question of fact.

### 5. Construction of specification and claims — Broad or narrow (§22.101)

Subjective desire to claim as broadly as possible does not establish that broader invention being claimed in reissue application is adequately described in original patent.

### 6. Reissue — In general (§58.1)

Objects of the Invention may, in some cases, provide support for claims sought through reissue.

### Particular patents — Tape Scanning Devices

Wilder, Whitney, and Matison, Instruction Indicating Apparatus for a Record and/or Playback Device, rejection of claims 1-16 reversed; rejection of claims 14-16 affirmed.

Appeal from Patent and Trademark Office Board of Appeals.

Application for reissue of patent of Leslie N. Wilder, James C. Whitney, and Gary G. Matison, Serial No. 079,171 filed to reissue Patent No. 4,051,540. From decision rejecting claims 1-16, applicants appeal (Lanier Business Products intervenor). Affirmed in part and reversed in part.

Gregor N. Neff, New York, N.Y. (William S. Frommer, New York, N.Y., and Melvin J. Scolnick, Stamford, Conn., of counsel) for appellants.

Thomas E. Lynch (Joseph F. Nakamura, and Jere W. Sears, on the brief) for Patent and Trademark Office.

Eugene S. Zimmer, Atlanta, Ga., for intervenor.

Before Baldwin, and Kashiwa, Circuit Judges, and Nichols, Senior Circuit Judge.

Baldwin, Circuit Judge.

This appeal is from a decision of the United States Patent and Trademark Office Board of Appeals (board) rejecting claims 1-16 of appellant's Reissue Application Serial No. 079,171. Claims 1-16 were rejected for appellants' failure to sufficiently allege error required by 35 USC §251 and for failure of appellants' oath to meet the requirements of 37 CFR 1.175(a)(5). Claims 14-16 were also rejected as being drawn to subject matter not disclosed in the original patent, U.S. Patent

No. 4,051,540. We reverse the board's rejection of claims 1-16 for failure properly to allege error as required by the statute and regulation but affirm the board's rejection of claims 14-16 on the ground that the disclosure requirement has not been satisfied.

### The Invention

The invention claimed in U.S. Patent No. 4,051,540 (the original patent) is a mechanism for indicating the location of information recorded on a dictating machine. A person speaking into a dictating machine indicates the location of instructions on a recording medium, such as a magnetic tape, by recording control tones at the beginning or end of the instructions. A person transcribing dictated information rewinds the tape in a transcribing machine. During rewinding, the transcribing machine scans the tape and detects control tones. The locations of detected tones are stored in an electrical circuit and lights appear on a linear array that correlate with the locations of control tones on the tape. After rewinding, the transcriptionist locates specific information by advancing the tape until an indicator aligns with a light in the array.

Claim 1 of the original patent is reproduced below:

1. Apparatus for indicating the location of particular information on a previously recorded record medium, said particular information being represented by predetermined recorded signals, comprising:

scanning means for scanning said record medium;

an array of selectively actuatable light emitting sources;

*indexing means for scanning said array of light emitting sources in synchronism with the scanning of said record medium, said indexing means being in actuating relation sequentially with each of said light emitting sources;*

detecting means for detecting the presence of said predetermined recorded signals during the scanning of said record medium to produce an actuating signal; and

temporary storage means for temporarily storing said actuating signal until said indexing means is in actuating relation with an unenergized light emitting source to energize said light emitting source. [Emphasis added.]

Claims 1-13 of the Reissue application are the same as claims 1-13 of the original patent. Unlike the original claims, reissue claims 14, 15, and 16 do not require that lights be scanned "in synchronism with the scanning of

said record medium." Accordingly, the original claims are directed to a species while the reissue claims are directed to the genus of indicating mechanisms that visually identify positions on a recording medium when the recording medium is scanned.

### Opinion

#### Error Rejections

The first order of business for the board and for this court is to determine whether appellants have satisfied the requirements of 35 USC §251 and 37 CFR 1.175. In re Clark, 522 F.2d 623, 625, 187 USPQ 209, 211 (CCPA 1975); In re Rowand, 526 F.2d 558, 559, 187 USPQ 487, 488 (CCPA 1975).

[1] The statute, 35 USC §251, provides, in pertinent part, that:

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

There are two distinct statutory requirements that a reissue oath or declaration must satisfy. First, it must state that the patent is defective or partly inoperative or invalid because of defects in the specification or drawing, or because the patentee has claimed more or less than he is entitled to. Second, the applicant must allege that the defective, inoperative, or invalid patent arose through error without deceptive intent. The applicants satisfied the first requirement by alleging less was claimed in the original patent than the patentee was entitled to claim. The only issue is whether error correctable through reissue was properly alleged.

The error alleged in the first declaration filed by the inventors was that:

[t]he true scope of the invention disclosed in the patent was not fully appreciated by us or by our attorney \* \* until the commercial success of the "Thought Master" record/playback device was found to be based, at least in part, on the linear array of fixed, selectively energizable light elements, each being selectively energized to

provide a visual light mark in response to a detected predetermined signal, and each being associated with a respective length of record tape, which is provided in the electronic indicator incorporated in the said "Thought Master" record/playback device.

The attorney who prosecuted the original patent stated in a declaration accompanying the reissue application:

3. That I did not fully appreciate the true nature and scope of the invention disclosed in the original application and thus did not prepare claims of broad enough scope to provide the patent protection to which the invention properly is entitled.

\* \* \*

6. My failure to fully appreciate the true nature and scope of the invention disclosed in the original application was without fraudulent or deceptive intention, and arose from inadvertence, accident or mistake.

In a subsequent declaration, the attorney further elaborated on the cause of his error with the following explanations:

7. The invention disclosed in said original application was incorporated into a dictating machine sold by the assignee of said patent under the trademark "Thought Master." When said patent issued, sales of this device had only recently begun. Subsequently, in the latter half of 1978, said assignee began marketing a modified version of a dictating machine, identified as the "Thought Master II" machine. Differences between these versions of the Thought Master dictating machines are described below.

8. In the summer of 1979, I conferred with James C. Whitney, the only one of the inventors still employed by the assignee, regarding the question of the scope of protection secured by said patent. Particularly, Mr. Whitney requested that I investigate the scope of said patent to determine if it adequately covered both versions of the Thought Master machine, and also if said patent adequately protected the broad invention disclosed therein from what Mr. Whitney believed to be possible attempts by competitors of the assignee who, in the future, might try to exploit said invention.

9. In accordance with Mr. Whitney's request, I investigated the claims of said patent in light of the prior art of which I then was aware. From my investigation, I concluded that said patent could support broader claims whose scope, broadly, is the combination of a linear array of fixed,

selectively energizable light elements; each being selectively energized from an inactive condition to an active condition to provide a visual light mark representing its active condition; a detector for detecting a predetermined signal as the record tape, upon which the predetermined signal is recorded, is being scanned to produce an actuating signal, a storage device for storing the actuating signal and an energizing circuit for energizing a respective light element, commensurate with the location of the record tape being scanned, with the stored actuating signal so as to provide, upon scanning the record tape, a display of the relative locations of the predetermined signals on the record tape. I further concluded that the limitations in the broadcast claim of said patent, quoted above in paragraph 5, is [sic] not essential for practicing the broad teachings of the invention disclosed in said patent, and I advised Mr. Whitney that, because of this limitation, the scope of the patent was not adequate to protect the invention properly.

10. I recognized, when I investigated the claims of said patent, that my speculation of the prior art, as hereinabove stated, was unwarranted and erroneous.

These statements in the declarations accompanying the reissue application show that the error relied upon is the attorney's failure to appreciate the full scope of the invention. That error arose because the attorney assumed the presence of features in the prior art that were not there. The board concluded this is not error that may be corrected through reissue because the defect could have been discovered during prosecution of the original patent. The board said. "[t]here may have been a lack of prescience of the existence of a genus but such lack of prescience does not constitute an error in the sense of section 251."

[2] The error provision of 35 USC §251 is to be liberally construed to permit correction of defects. *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 294 (Fed. Cir. 1984); *In re Oda*, 443 F.2d 1200, 1203, 170 USPQ 268, 270 (CCPA 1971). An attorney's failure to appreciate the full scope of the invention is one of the most common sources of defects in patents. The fact that the error could have been discovered at the time of prosecution with a more thorough patentability search or with improved communication between the inventors and the attorney does not, by itself, preclude a patent owner from correcting defects through reissue. In this case, the attorney's error was discovered after commercialization of the invention and issuance of the patent. An application for broader



claims was filed within two years after the original patent issued. Under these circumstances, the attorney's explanation of his error in misunderstanding the scope of the invention is sufficient to satisfy the error requirement of 35 USC §251. We accordingly reverse the board's rejection for failure to allege error correctable through reissue.

[3] The examiner also rejected appellants' application for failure to comply with the requirements of 37 CFR §1.175(a)(5). The board affirmed this rejection without comment. The regulation relied on by the examiner and the board requires:

*1.175 Reissue oath or declaration*

(a) Applicants for reissue \* \* \* must also file with their applications a statement under oath or declaration as follows:

\* \* \*

(5) Particularly specifying the errors relied upon, and how they arose or occurred. The examiner found that applicants failed to allege facts that explain how the error arose. This finding is clearly erroneous. In *re De Blauwe*, Appeal No. 84-513, slip op. at 10, 222 USPQ 191 (Fed. Cir. June 8, 1984). The attorney who prosecuted the patent declared that his error, misunderstanding the scope of the invention, arose because no prior art search was done and he assumed limitations were required by the prior art without justification. This, in our view, is a sufficient explanation of how the error arose to satisfy the requirements of 37 CFR §1.175(a)(5).

*Disclosure Rejection Of Claims 14-16*

[4] The board rejected claims 14-16 for inadequate description to support generic claims that do not require synchronous scanning. The description requirement is found in 35 USC §112 and is separate from the enablement requirement of that provision. In *re Bowen*, 492 F.2d 859, 864, 181 USPQ 48, 52 (CCPA 1974); In *re Smith*, 481 F.2d 910, 914-15, 178 USPQ 620, 623-25 (CCPA 1973). It is not necessary that the claimed subject matter be described identically, but the disclosure originally filed must convey to those skilled in the art that applicant had invented the subject matter later claimed. In *re Kaslow*, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983). Precisely how close the original description must come to comply with the description requirement of section 112 must be determined on a case by case basis. In *re Smith*, 458 F.2d 1389, 1395, 173 USPQ 679, 683 (CCPA 1972). We fail to see that the board's finding of inadequate

description \* is clearly erroneous. In *re De Blauwe*, Appeal No. 84-513, slip op. at 10, 222 USPQ 191 (Fed. Cir. June 8, 1984), and accordingly affirm the board's rejection of claims 14-16.

[5] Appellants admit that the synchronous scanning equipment is the only embodiment of the invention disclosed in the original patent. To overcome the board's decision, appellants point out that the description of one of the drawings says that dictation apparatus illustrated in the drawing is "one in which the present invention finds ready application." Appellants also note that the title of the patent "Instruction Indicating Apparatus For A Record And/Or Playback Device" is quite broad. The general description of a drawing and the broadly phrased title of the patent demonstrate, appellants contend, that other embodiments are contemplated and are sufficient to satisfy the disclosure requirement. These phrases relied upon by appellants demonstrate a desire to claim the invention as broadly as the prior art would allow. But a desire to claim as broadly as possible is the objective of most applicants for a patent. This subjective desire does not establish that the broader invention being claimed in this reissue application is adequately described in the original patent. The broadly worded title of the original patent and customarily broad description of the drawing do not satisfy the description requirement in this case.

[6] Appellants also rely on statements in the Objects of the Invention section of the specification to satisfy the description requirement. The Objects of the Invention may, in some cases, provide support for claims sought through reissue. In *re Handel*, 312 F.2d 943, 136 USPQ 460 (CCPA 1963). They do not satisfy the disclosure requirement in this case. For instance, one of the recited objects says:

[I]t is an object of the present invention to provide improved indicating apparatus for indicating the location of particular information on a record medium which overcomes the aforementioned problems.

The "aforenoted problems" relate to difficulties associated with paper scales graduated in minutes previously used to note the approximate place on a tape where instructions were located. In our view the board correctly read the Objects of the Invention as doing little more than outlining goals appellants hope the

\* The inquiry into whether the description requirement is met is a question of fact. In *re Wertheim*, 541 F.2d 257, 262, 191 USPQ 90, 96 (CCPA 1976); In *re Ruschig*, 379 F.2d 990, 996, 154 USPQ 118, 123 (CCPA 1967).

claimed invention achieves and the problems the invention will hopefully ameliorate. But the invention that achieves these general objectives must still be described. Appellants have not shown that the generic invention of claims 14-16 is supported by the original patent's disclosure in such a way as would indicate possession, as of the original filing date, of that generic invention. The present situation is to be distinguished from this court's recent decision in *In re Peters*, 723 F.2d 891, 221 USPQ 952 (Fed.Cir. 1983), brought to our attention by appellants. In *Peters*, the appellant successfully rebutted the PTO's rejection by proving that the broadened claims "merely omit an unnecessary limitation [the word "tapered"] that had restricted one element of the invention to the exact and non-critical shape disclosed in the original patent." *Id.* at 893, 221 USPQ at 953. The court further commented: "Indeed, if the reissue claims had been submitted with the original application, it is difficult to perceive how they could have been properly rejected under §112." *Id.* at 894, 221 USPQ at 953.

For the foregoing reasons, we *reverse* the board's rejection of claims 1-16 for failure to allege error correctable through reissue and the cause of the error. We *affirm* the board's rejection of claims 14-16 for claiming subject matter not adequately disclosed in the original patent.

*Reversed in Part and Affirmed in Part*

### Court of Appeals, Second Circuit

Plus Products v.  
Plus Discount Foods, Inc. et al.

Nos. 83-7238, 83-7292, and 83-7294

Decided Nov. 3, 1983

### TRADEMARKS

#### 1. Infringement — In general (§67.431)

Crucial issue in all trademark and trade name infringement cases is whether there is any likelihood that appreciable number of ordinary consumers are likely to be

goods in question; solution of this problem depends upon consideration of facts and circumstances in each case.

#### 2. Identity and similarity — How determined — Considering goods (§67.4057)

Related but non-competing products can become associated in consumers' minds, and functional differences between products of parties is immaterial if confusion as to source of goods is evident.

#### 3. Identity and similarity — How determined — Considering goods (§67.4057)

Appropriate analysis in determining likelihood of confusion between non-competing products is to consider and balance factors enumerated in *Polaroid Corp. v. Polarad Electronics Corp.*, 128 USPQ 411; no single Polaroid factor is determinative; rather, each must be considered in context of all other factors, and one is able to reach ultimate conclusion whether there is likelihood of confusion between two parties' products, from balance of these determinations.

#### 4. Courts of Appeals — Weight given findings of District Court — Trademark and unfair competition cases (§29.357)

District court's determination of each of *Polaroid Corp. v. Polarad Electronics Corp.*, 128 USPQ 411, factors is finding of fact to which "clearly erroneous" standard is applicable; however, court's use of those factors, and its determination of likelihood of confusion based on balancing of or relative weight given to each of its findings, is legal conclusion that is reviewable by appellate court as matter of law.

#### 5. Marks and names subject to ownership — In general (§67.501)

Distinctiveness of trademark determines its relative strength or weakness; in other words, "strength" of mark denotes its tendency to identify goods sold under it as emanating from particular source.

#### 6. Marks and names subject to ownership — In general (§67.501)

Trademarks are generally categorized, in ascending order of distinctiveness, as generic, descriptive, suggestive, or arbitrary; although this classification system is helpful tool it is not determinative, for strength of mark depends ultimately on its distinctiveness or its origin indicating quality in eyes of purchaser.